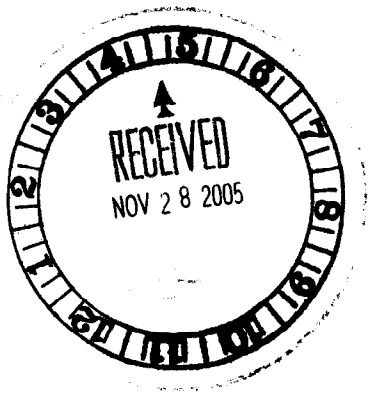
Desert Grape Growers League of California

November 28, 2005



Docket Clerk, Marketing Order Administration Branch
Fruit and Vegetable Programs
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue, S. W.
Washington, D. C. 20250

To Whom It May Concern:

Re: FV03-925-1 PR
Federal Register Notices: May 25, 2005, p. 30001;
July 25, 2005, p. 42513; and September 27, 2005, p. 56378

On behalf of the Desert Grape Growers League (DGGL), I am pleased to provide comment in response to the proposed rule published in the above noted copies of the Federal Register proposing changes to the regulatory periods for table grapes grown in Southeastern California and imported table grapes (Docket No. FV 03-925-1PR).

DGGL is an organization of table grape producers and handler/shippers all of whom operate under the Desert Grape marketing order (7 CFR 925 and 944) which is administered by the California Desert Grape Administrative Committee. DGGL's membership produces and ships in excess of 90% of the desert (Coachella Valley) table grapes.

In 1987 when the effective date of the table grape marketing order was changed, there were 88 growers, 25 handlers/shippers and the acreage was 18,815. This year, the number of table grape producers is 40, the number of handlers/shippers, 18, and there are approximately 8,578 acres of table grapes under the marketing order jurisdiction. From 1987 to 2005, this equates to a 45% reduction in the number of growers and a 55% reduction in acreage. These reductions were not brought about because family farmers decided to voluntarily cut back on growing table grapes. Over the years, the industry has been severely hurt because of the tremendous increase of Chilean table grape imports

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during the months of March and April, a significant number of which had quality problems that reduced the consumer's interest at the beginning of our domestic harvesting season and which resulted in severe economic losses which forced many growers out of business.

The proposed rule comports with Section 608e-1(b) of the Agricultural Adjustment Act of 1938 as amended (7 USC 608e-1(b), which allows for an extension of the marketing order regulation period not to exceed 35 days in addition to the period of time covered by the marketing order if such action is needed to prevent the circumvention of the grade, size, quality or maturity standards of a seasonal marketing order by imports. While DGGL notes that the proposed regulation advances the beginning of the effective date less than the statutory time period allowed, we believe that the April 1 beginning date should ensure that there are no inferior grapes in the marketplace when our Coachella table grapes are being marketed. This change would result in quality grapes for the consumer and would eliminate any pull down of prices at the beginning of the domestic marketing season.

DGGL is in full support of the proposed rule because it will curtail the marketing of uninspected imported table grapes at the time that Coachella Valley inspected grapes are also being marketed.

The desert grape marketing order and the table grape import regulation require that before grapes can enter the U.S. market they must be inspected. This inspection is called a "shipping point" inspection and the requirements to be met are required for both imported and domestic grapes during the time the marketing order is in effect. However, currently uninspected imported grapes that entered the U.S. prior to the April 20 effective date are still being released in the domestic market to compete against our inspected domestic grapes. The quality of the imported fruit at this time is substandard and impacts adversely on our domestic grape sales. As noted above this is why our family farms have dropped from 88 to 40 since 1987, when the last effective date change was put into effect, and our acreage has dropped to just a little over 8,000.

The proposed rule will ensure that all grapes imported on April 1 must be inspected and this will guarantee that consumers of this country will always be able to purchase quality table grapes. It will keep our domestic industry viable and assure our producers that they will not have to meet strict requirements that Chilean exporters and U.S. importers have thus far evaded.

The economic repercussions which our industry has sustained must not continue. We must address the problem now, and the proposed rule should be put into effect as soon as possible if our industry is to survive.

When the table grape marketing order was changed in 1987, there were a number of public comments made which predicted gloom and doom for the Chilean table grape industry and some U.S. importers if the effective date were to be moved earlier than May 1. However, one has only to look at the trade situation currently to see how much in error these predictions were.

While I do not wish to respond to every erroneous charge that was made in 1987, I would like to bring to your attention some of the statements and dire predictions and offer my assessment of the true trade picture concerning Chilean table grape trade with the U.S.

1. March 12, 1987 letter to USTR from the Hon. Hernan Felipe Errazuriz Correa, Ambassador of Chile to the United States, p. 2:

"The Chilean grapes already are at a serious disadvantage because the inspection procedures applied with the effect of a less favourable treatment than that accorded to the like domestic product."

Comment:

Federal regulation (7 CFR 51.885) provides that inspection for both domestic and imported table grapes is preformed using the same shipping point tolerances when the product is placed in the market. The fact that Chilean grapes may be impaired because of travel to the U.S. is the result of Chile's doing business with a foreign country that is a distance from its shores. U.S. exporters face the same situation when we export our grapes or any other perishable product to a foreign country. Unfortunately, circumstances differ for trade within a country as compared to that outside the country, especially when the foreign country is far away. This situation is analogous to the cost U.S. growers face in competing with foreign growers who have no restrictions on what kind and amount of pesticides they can use on their crop, no environmental restrictions, or, for example the use of child labor in foreign countries which is prohibited in our country.

2. Ibid, p. 3

> "In addition, Marketing Order 925 applies only to imported grapes during a time period during which virtually no domestic grapes covered by the Order are marketed."

Comment:

Marketing Order 925 (7 CFR 925) is the federal marketing order for table grapes grown in a designated area of southeastern California (Coachella Valley). It establishes the California Desert Grape Administrative Committee which administers the order. Section 925.304 provides that "no person shall pack or repack any variety of grapes except....unless such grapes meet the requirements specified in this section." 7 CFR 944.503, Table Grape Import Regulation 4, provides in (a)(3) that all regulated (non-exempt) varieties of grapes that are imported shall be subject to grape import requirements effective April 20 through August 15. Neither of these regulations requires that the domestic grapes and the imported grapes be in the domestic market at the same time. Neither is this required in the Agricultural Marketing Agreement Act (AMAA).

Further, 7 CFR 608e-1 (a) provides that whenever a marketing order that contains terms or conditions "regulating the grade, size, quality, or maturity" of table grapes produced in the U.S., the importation into the U.S. of any such commodity during the period of time such order is in effect (emphasis added) shall be prohibited unless it complies with the grade, size, quality and maturity provisions of such order.

The purpose of the AMAA is to provide for the orderly marketing of a product. The marketing order and Import Regulation 4 require specific standards regarding grade and quality of table grapes marketed in the U.S. The quality of the imported grapes at the beginning of the domestic season is a very important indicator as to consumers' additional purchase of grapes.[1] If the consumer has a bad experience with low-quality grapes then they will look for other fruit that is more appeasing to them. This adversely impacts the domestic producer just at the time when he is offering his crop on the market.

In a 1988 court case in the U.S. District Court for the Eastern District of Pennsylvania (Cal-Fruit Suma International et al. vs. U.S. Department of Agriculture, October 11, 1988), the court stated that the Congressional intent behind Section 608e(1) was that imports not thwart the goals of the AMAA. (Emphasis added).

The court noted that the threshold standards the U.S. Department of Agriculture applies is at the same point in time for both imported and domestic product, i.e., when the product enters the U.S. domestic market, and that the law does not allow a lesser tolerance for grapes that are debilitated due to travel to the U.S. to compete with domestic grapes "subjected to inspection under higher standards."

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[1]Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops, Nicholas J. Powers, ERS Agricultural Economic Report Number 629, ERS, U.S. Department of Agriculture, March 1990.

3. Ibid, p. 4

> "The Government of Chile believes the proposed change in the Marketing Order must be examined in the light of the rules and disciplines of the Agreement on Technical Barriers to Trade (TBT) of the GATT to which the US and Chile are signatories."

Comment:

The 1988 court case mentioned above also discusses the applicability of the TBT Agreement and our domestic marketing orders. The court noted that the TBT Agreement in Section 2431 states that no standards-related activity of a Federal agency is deemed to constitute an unnecessary obstacle to the foreign commerce of the U.S. if the purpose of the activity is to achieve a legitimate domestic objective... and if such activity does not exclude imported products which fully meet the objectives of such activity.

The court noted that this language sanctions such activities that serve valid domestic objectives and do not exclude imports that meet those objectives. The court stated: "The (table grape) Marketing Order regulations fully comply with these requirements."

4. Memorandum, August 25, 1987, Analysis of Express and Implied Authority Contained in the Agricultural Marketing Agreement Act to Remedy Discriminatory Grade Barriers Imposed by Federal Grading and Inspection Procedures, Akin, Gump, Strauss, Hauer & Feld, Washington,
D. C., P. 2

> "The result of this discrimination (the fact domestic grapes are inspected at the point of shipment and imported grapes are inspected at the point of entry into the U.S.) is the virtual elimination of Chilean table grapes from the U.S. market during the effective period of the marketing order."

Comment:

An examination of trade data on Chilean table grape exports to the U.S. has proven this statement absolutely false. In fact, in 1987, the first year the new effective date of April 20th was in effect (having moved from May 1), Chilean grape imports for the months of March, April and May increased 9% over the previous year. From 1987 to 2005, trade for these months has increased 166 %. Chile is continuing to export table grapes to the U.S. and as noted in increasing numbers.

The future supply of Chilean table grape imports will depend entirely on how the Chilean table grape exporters and U.S. importers want to move the grapes.

5. Letters to USDA alleging "shortening of the season" if the 1987 change in the effective date is approved. Letters from:

Charles P. Pizzi, Director of Commerce, City of Philadelphia, dated 1/23/87
Henry F. Corry, President, Ports of Philadelphia Maritime Exchange, 2/2/87
John J. Coscia, Executive Director, Delaware Valley Regional Planning Commission,
1/21/87
Lee T. Stull, Managing Director, Greater Philadelphia International Network, Inc.

Comment:

This statement implies that Chile cannot export quality grapes to the U.S. after the effective date begins and that, therefore, the Philadelphia port's import season would end at that time. This reasoning gives credence to the fact that Chile's exports up to the effective date contains lower quality grapes that could not pass inspection once mandatory inspection is imposed. The purpose of the effective date rule change in 1986/87 and the purpose of the currently proposed rule is not to "shorten the season" for Chilean table grape imports. The purpose is to require that Chilean table grapes in the U.S. marketplace after April 1 be inspected to ensure that they meet grade and quality requirements that is required of the Mexican and desert grape industry.

Chile exports to the European Union which has a grade and quality standard (equivalent to that of the U.S.) that is effective for the entire year. Chile meets the EU requirements with quality grapes, but when Chile has an excessive supply of grapes, as in 2000, the excess was not sent to the EU but to the United States where they were stored and then sold for whatever price could be achieved. The proposed rule does not set a limit on such imports - it merely states that if a country wants to send its grapes to the U.S. then it has to meet the grade and quality requirements that our domestic producers have to meet for our consumers. If Chile can do this for Europe, then it certainly can do this for the U.S.

6. Court Decision on Cal-Fruit Suma International et al. vs. U.S. Department of Agriculture, U.S. District Court for the Eastern District of Pennsylvania, October 11, 1988

> "Plaintiffs also insist that the AMAA only allows for implementation of the Marketing Order when domestic grapes are available for marketing..."

Comment:

In this decision, the court ruled that "rather than narrowly restricting the application of marketing orders to the "normal marketing season" as plaintiffs would interpret it" the AMAA contemplated that "marketing orders should be designed to embrace all conditions that will impact on price and supply fluctuations (emphasis added) within the normal marketing season."

Further, Section 925.51(a)(2) of the table grape marketing order specifies that the regulation may "limit the handling of any grade, size, quality, maturity, or pack of grapes differently for different varieties, or any combination of the foregoing during any period or periods" (emphasis added).

I am also aware that the Agricultural Marketing Service is in receipt of a recent letter from David A. Holzworth, ASOEX General Counsel for the United States, of the law firm Lepon Holzwroth & Kato, PLLC, commenting on the proposed rule. Mr. Holzworth's letters contain several erroneous comments:

7. August 5, 2005, letter from David Holzworth to AMS:

> "See, 7.U.S.C. §6083-1 (b)(2). USDA as a legal matter, must pay very close attention to the specific statutory criteria governing the imposition of a beginning marketing order date that, on average, precedes the availability of all domestic varieties by more than 35 days and will be imposed on import varieties from Chile when there are none of the same varieties available from domestic sources. More specifically, the Proposed Rule will impose marketing order standards on Chilean supplies of Thompsons and Crimsons during a period when no supplies of Thompsons or Crimsons are available from domestic sources, and when no significant commercial quantities are available of any domestic variety."
>
> "... Thus, the statutory language mandates an examination of availability and price of grape by variety."

Comment:

Subsection (b) of § 608e-1(b) provides explicit authority to the Secretary of Agriculture to extend the period of time (not to exceed) 35 days in addition to the marketing order period. However, this can be accomplished only if the Secretary determines that it would effectuate the purposes of the Agricultural Marketing Agreement Act and if it would prevent the circumvention of the grade, size, quality or maturity requirements of a seasonal marketing order. Additionally, Subsection (b)(2) lists three conditions which

the Secretary must consider in making a decision to extend the date of the marketing order: (a) to what extent during the previous year imports did not meet the requirements of the marketing order when like domestic product was being marketed, (b) if the imports circumvented the grade, size, quality or maturity standards of the marketing order, and (c) the availability and price of commodities of the variety covered by the marketing order during any additional period the order was to be in effect. However, Subsection (b) (2) merely provided guidance to the Secretary in determining the extension. It does not stipulate that these three conditions must be the basis for the decision. They must only be "considered."

Mr. Holtzworth's statement does not take into account that § 608e-1 is a broad provision which is applicable not only to table grapes imports but also to tomato, raisin, olive (other than Spanish-style green olive), prune, avocado, mango, lime, grapefruit, green pepper, Irish potato, cucumber, orange, onion, walnut, date, filbert, eggplant, kiwifruit, nectarine, plum, pistachio and apple imports. The Congressional intent behind this provision and its extension authority was not to consider a separate marketing order for each variety of the above-mentioned 23 fruits which seems to be Mr. Holtzworth's viewpoint. That would have meant hundreds of specific marketing orders that would overload and overwhelm the staff of AMS. The law refers to the non-exempt (versus the exempt) category of fruit that is covered in each fruit marketing order. For example, non-exempt table grapes in the marketing order include all table grapes except for the following: Emperor; Calmeria; Almeria; Ribier; Italia Pirovano (Blanca Italia); Christmas Rose; Muscatel; Barlinka; Dauphine; Kyojo; Waltham Cross; Alhonse Lavallee; Bien Donne; Bonnoir (Bonheur); La Rochelle; Queen; Rouge; Sonita; Emperatriz; and Red Globe.

By applying Subsection (b)(2) to each variety of fruit, Mr. Holtzworth is also not taking into account the fact that the very nature of different varieties of fruits precludes their being available at various times of the year regardless of whether or not a marketing order is in effect. For example, some varieties produce very early in the spring while others do not reach the level of maturity (level of brix) until much later in the season.

As mentioned above (see comment to Statement 6), the Federal court in 1987 did not embrace the any action that thwarts the purposes of the marketing order and disallowed the plantiffs' statement that the AMAA only allows for implementation of the marketing order when domestic grapes are being marketed.

8. August 5, 2005, letter from David Holtzworth to AMS:

> "...As a preliminary matter, the statutory framework requires the agency to determine the date from which the 35 days may be counted. Clearly, the 35 days canot be counted from April 20. April 20 already precedes by 21 days the

historical average beginning pack-out of commercially significant quantities (20,000 cases or more) of Coachella's early season Perlettes, the only variety that has any possibility of competing with Chilean Thompsons. The existing April 20 date already exceeds the statutory limit of 35 days for the historical average beginning pack-out of Coachella Thompsons. The statute cannot be read as a progressive bootstrapping device to permit repeated extensions of the marketing order date in 35-day increments. Therefore, the proposal to exceed the 35 days permitted by the statute is a violation of the legislative mandate."

Comment:

Again, Mr. Holtzworth is interpreting the law to apply to each variety of table grapes instead of non-exempt grapes. The proposed rule correctly proposes an April 1 date which is less than the 35 days in addition to the time period covered by the marketing order which is explicitly provided in Section 608e-1.

Mr. Holtzworth has added to the law by inventing his own test as to the applicability of the extension period. Section 608e-1 does not propose that the extension of the effective date period must be based on the domestic "historical average beginning pack-out of commercially significant quantities" which Mr. Holtzworth has subjectively determined to be 20,000 cases or more of Coachella early-season grapes.

It is apparent to me that Mr. Holtzworth does not understand agriculture. He is an attorney who grabs at various sections of the law and interprets them in a way that will conform to his way of thinking. Helping to formulate and oversee marketing orders is a vital purpose of AMS, and I feel sure that in assessing Mr. Holtzworth's erroneous but admittedly creative views, AMS will base its decision on the proposed rule in accordance with the exact word of the law and Congressional intent.

9. Undated letter of Andres Perez de Arce, Foodamerica S.A. (This same statement was also included in several other form-type letters submitted to AMS on the proposed rule).

The Proposed Rule assesses inspection fees starting April 1 when no domestic suppies are being so charged, and thereby violates Article III and Article VIII of GATT 1994."

Comment:

Article III (National Treatment) refers to charges or fees "of any kind in excess (emphasis added) of those applied, directly or indirectly, to like domestic products."

Article VIII (Fees and Formalities connected with Importation and Exportation) states that all fees imposed on imports "shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products...". The table grape marketing order requires that both imported table grapes and domestic grapes (Coachella Valley) be inspected for quality and grade purposes. The fees are identical. In other words, there are no imposed fees on imported table grapes that are not also applicable to domestic grapes under the marketing order. Finally, as discussed earlier, the federal court has ruled that any action that impacts adversely on the purposes of the marketing order even if this action occurs prior to the effective date period must be addressed. (See comments 6 and 7).

10. Undated letter of Cristian Del Sante, General Manager, Importadora y Exportadora Bendel SA, Santiago, Chile (This same statement was also included in several form-type letters submitted to AMS on the proposed rule).

> "The proposed change can not be justified under the criteria established by the AMAA for a change in the beginning effective date of Marketing Order 925 or the companion Table Grape Import Regulation 4 in view of the record prices received by Coachella Valley growers in the last two seasons."

There is no requirement in the law that states domestic growers must not exceed a certain amount of money for their table grapes in order to request a change in the effective date of the marketing order or in order for AMS to make a decision on such a request. Section 608-e-1(b) provides that the Secretary may provide for an extended period of time (not to exceed 35 days) to the marketing order if the Secretary finds that such additional time is necessary "(A) to effectuate the purposes of this chapter; and (B) to prevent the circumvention of the grade, size, quality, or maturity standards of a seasonal marketing order applicable to a commodity produced in the United States by imports of such commodity."

As I noted at the beginning of this letter, the impact of tremendous shipments of problem Chilean table grapes have been the major cause for the steep drop in our table grape acres and the loss of so family farmers.

In closing, DGGL wishes to comment on a matter in which representatives of the Chilean table grape industry expressed an interest during the 1986-1987 effective date change period. At that time, Chile expressed an interest in inspection of their grapes in Chile, and it is reasonable to believe they will once again urge this action. In this regard, I am attaching several letters written by officials of the U.S. Department of Agriculture which does not support such a change in Departmental policy or law.

DGGL is well aware, however, that last year AMS was considering conducting a "pilot" inspection project in Mexico but that this project never came to fruition. Having reviewed the many previous letters from the department (which are attached and mentioned above), I must say this action came as a surprise. Should the Chileans make such a request this year, I would expect the department to provide a full explanation of why it now believes it has authority to provide inspection overseas and how it would account for the safety of our inspectors in a world with increasing terrorism.

DGGL appreciates this opportunity to provide comment in support of the proposed rule.

Sincerely,

Robert Bianco
President

Attachments (6)